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2  
3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 TONI H.,

7 Plaintiff,

8 v.

9 COMMISSIONER OF SOCIAL  
10 SECURITY,

11 Defendant.

CASE NO. C18-5992 BHS

ORDER AFFIRMING DENIAL OF  
BENEFITS

12  
13 **I. BASIC DATA**

14 Type of Benefits Sought:

15 (X) Disability Insurance

16 ( ) Supplemental Security Income

17 Plaintiff's:

18 Sex: Female

19 Age: 42 at the time of alleged disability onset.

20 Principal Disabilities Alleged by Plaintiff: Abdomen pain, malabsorption syndrome,  
21 depression, anxiety. AR at 40, 69.

22 Disability Allegedly Began: October 1, 2009

Principal Previous Work Experience: Real estate agent, receptionist.

Education Level Achieved by Plaintiff: GED

## II. PROCEDURAL HISTORY—ADMINISTRATIVE

This is the third time this case is before the Court. Administrative Law Judge (“ALJ”) Cynthia Rosa originally held a hearing in this matter on December 20, 2012, after which she issued a decision finding Plaintiff not disabled. *See* AR at 18–30, 35–67. On May 5, 2015, Magistrate Judge Karen L. Strombom reversed that decision and remanded the matter for further administrative proceedings. *Id.* at 649–58.

On remand, ALJ Rosa held a second hearing, and again issued a decision finding that Plaintiff was not disabled. *Id.* at 546–61, 598–617. On November 28, 2016, Magistrate Judge J. Richard Creatura reversed ALJ Rosa’s second decision and remanded the matter for further administrative proceedings. *Id.* at 1013–29.

On the most recent remand, the matter was considered by ALJ Marilyn S. Mauer. *See id.* at 926–45.

- Before ALJ:

Date of Hearing: August 28, 2017, April 3, 2018

Date of Decision: September 25, 2018

Appears in Record at: AR at 926–45

Summary of Decision:

The claimant met the insured status requirements of the Social Security Act (the “Act”) through December 31, 2014.

The claimant did not engage in substantial gainful activity during the period from her alleged onset date of October 1, 2009, through her date last insured of December 31, 2014. *See* 20 C.F.R. §§ 404.1571–76.

Through the date last insured, the claimant had the following severe impairments: Post gastric bypass syndrome with iron deficiency, status

1 post ventral hernia repair, low back pain, morbid obesity, chronic pain  
2 syndrome, depression, anxiety, and posttraumatic stress disorder. *See* 20  
C.F.R. § 404.1520(c).

3 Through the date last insured, the claimant did not have an  
4 impairment or combination of impairments that met or medically equaled  
the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart  
P, Appendix 1. *See* 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526.

5 Through the date last insured, the claimant had the residual  
6 functional capacity (“RFC”) to perform a range of sedentary work as  
defined in 20 C.F.R. § 404.1567(a). The claimant could lift 10 pounds  
7 frequently, and less than 10 pounds occasionally. She could sit, stand, and  
walk up to two hours in an eight-hour work day. She could sit for at least  
8 six hours in an eight-hour work day. She could never climb ladders, ropes,  
or scaffolds. She could occasionally climb ramps and stairs. She could  
9 occasionally stoop, kneel, crouch, and crawl. She could not be exposed to  
vibrations and hazards. She could understand, remember, and carry out  
10 instructions to complete tasks requiring a GED reasoning level of two or  
less. She could work in a setting with no public contact.

11 Through the date last insured, the claimant was unable to perform  
12 any past relevant work. *See* 20 C.F.R. § 404.1565.

13 The claimant was a younger individual (age 18–49) through the date  
14 last insured. *See* 20 C.F.R. § 404.1563.

15 The claimant has at least a high school education and is able to  
communicate in English. *See* 20 C.F.R. § 404.1564.

16 Transferability of job skills is not material to the determination of  
disability because using the Medical-Vocational Rules as a framework  
17 supports a finding that the claimant is “not disabled,” whether or not she  
has transferable job skills. *See* Social Security Ruling 82–41; 20 C.F.R.  
18 Part 404, Subpt. P, App. 2.

19 Through the date last insured, considering the claimant’s age,  
education, work experience, and RFC, there were jobs that existed in  
20 significant numbers in the national economy that she could perform. *See*  
20 C.F.R. §§ 404.1569, 404.1569(a).

1           The claimant was not under a disability, as defined in the Act, at any  
2           time from October 1, 2009, the alleged onset date, through December 31,  
3           2014, the date last insured.

4           • Before Appeals Council:

5           The Appeals Council did not assume jurisdiction of the case and Plaintiff did not  
6           seek its review. *See* Pl. Op. Br. (Dkt. # 8) at 2. The ALJ's decision thus became the  
7           Commissioner's final decision. *See* 20 C.F.R. § 404.984(d).

8                           **III.       PROCEDURAL HISTORY—THIS COURT**

9           Jurisdiction based upon: 42 U.S.C. § 405(g)

10          Brief on Merits Submitted by (X) Plaintiff<sup>1</sup> (X) Commissioner

11                           **IV.       STANDARD OF REVIEW**

12          Pursuant to 42 U.S.C. § 405(g), the Court may set aside the Commissioner's  
13          denial of Social Security benefits when the ALJ's findings are based on legal error or not  
14          supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d  
15          1211, 1214 n.1 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than  
16          a preponderance, and is such relevant evidence as a reasonable mind might accept as  
17          adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971);  
18          *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for  
19          determining credibility, resolving conflicts in medical testimony, and resolving any other  
20          ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).  
21          While the Court is required to examine the record as a whole, it may neither reweigh the

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22                   <sup>1</sup> Plaintiff opted not to file a reply brief. *See* Notice (Dkt. # 10).

1 evidence nor substitute its judgment for that of the ALJ. *See Thomas v. Barnhart*, 278  
2 F.3d 947, 954 (9th Cir. 2002). “Where the evidence is susceptible to more than one  
3 rational interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion  
4 must be upheld.” *Id.*

## 5 **V. EVALUATING DISABILITY**

6 Plaintiff bears the burden of proving she is disabled within the meaning of the Act.  
7 *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The Act defines disability as the  
8 “inability to engage in any substantial gainful activity” due to a physical or mental  
9 impairment which has lasted, or is expected to last, for a continuous period of not less  
10 than twelve months. 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Act  
11 only if her impairments are of such severity that she is unable to do her previous work,  
12 and cannot, considering her age, education, and work experience, engage in any other  
13 substantial gainful activity existing in the national economy. 42 U.S.C. § 423(d)(2)(A);  
14 *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

15 The Commissioner has established a five-step sequential evaluation process for  
16 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R.  
17 § 404.1520. The claimant bears the burden of proof during steps one through four.  
18 *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). At step  
19 five, the burden shifts to the Commissioner. *Id.*

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Plaintiff contends that the ALJ failed to fully incorporate Dr. Postovoit's opinions into the RFC and hypothetical questions posed to the VE, depriving the ALJ's finding at step five of substantial evidentiary support. Pl. Op. Br. at 3.

The ALJ gave Dr. Postvoit’s opinions “significant weight.” *Id.* at 940. Without explanation, however, the ALJ did not include a restriction to daytime shifts in the RFC or hypotheticals posed to the VE. *See id.* at 932, 978-85.

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1       The Commissioner argues that the ALJ’s error was harmless. Def. Br. at 2–4.  
2       “An ALJ’s error is harmless where it is ‘inconsequential to the ultimate nondisability  
3       determination.’” *Molina*, 674 F.3d at 1115 (quoting *Carmickle v. Comm’r, Soc. Sec.*  
4       *Admin.*, 533 F.3d 1155, 1162–63 (9th Cir. 2008)). “In other words, in each case we look  
5       at the record as a whole to determine whether the error alters the outcome of the case.”  
6       *Id.* The Commissioner argues that the ALJ’s error was harmless because one of the jobs  
7       the ALJ identified at step five satisfies Dr. Postovoi’s daytime shift restriction and the  
8       RFC, so the ALJ’s failure to specifically include that limitation in the RFC or  
9       hypotheticals to the VE does not change the outcome here. Def. Br. at 2–3. The Court  
10      agrees.

11       In the most recent decision, the ALJ identified three jobs—based on VE  
12      testimony—that Plaintiff could perform considering her age, education, work experience,  
13      and RFC: Document preparer, bench hand, and table worker. AR at 944. The VE  
14      testified that there are 99,500 document preparer jobs nationally. *Id.* at 980. Although  
15      the ALJ did not include Dr. Postovoi’s daytime shift restriction in her hypotheticals to  
16      the VE, vocational testimony from one of the earlier hearings in this matter covered that  
17      issue. On October 28, 2015, VE Todd Gendreau testified that the job of document  
18      preparer had “only day shifts.” *Id.* at 615. The job of document preparer would therefore  
19      satisfy all of the identified elements that should have been included in the RFC.

20       At step five of the disability evaluation process, the ALJ must determine whether  
21      there are jobs existing in significant numbers in the national economy that Plaintiff could  
22      perform considering her age, education, work experience, and RFC. *See* 20 C.F.R. §

1 404.1520(a)(4)(v). Even excluding the jobs of bench hand and table worker, the ALJ met  
2 this standard. The evidence establishes that there are 99,500 document preparer jobs  
3 nationally, which satisfies the “significant numbers” requirement at step five. *See*  
4 *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 528-29 (9th Cir. 2014) (finding 25,000  
5 jobs nationwide significant); *Moncada v. Chater*, 60 F.3d 521, 524 (9th Cir. 1995)  
6 (finding 64,000 jobs nationwide significant).

7 In sum, the ALJ identified at least one job existing in significant numbers that  
8 Plaintiff could perform considering her RFC and Dr. Postovoi’s daytime shift restriction.  
9 The ALJ’s failure to include Dr. Postovoi’s daytime shift restriction in the RFC or  
10 hypotheticals to the VE was therefore inconsequential to the nondisability determination.  
11 Plaintiff has accordingly failed to show that the ALJ committed harmful error. *See*  
12 *Molina*, 674 F.3d at 1111 (citing *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)).

### 13 **VIII. ORDER**

14 Therefore, it is hereby **ORDERED** that the Commissioner’s final decision  
15 denying Plaintiff disability benefits is **AFFIRMED** and this case is **DISMISSED** with  
16 prejudice.

17 Dated this 30th day of May, 2019.

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20 BENJAMIN H. SETTLE  
21 United States District Judge  
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